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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

Dali Wireless, Inc.,

Plaintiff,

1

Corning Optical Communications LLC.

Defendant.

Case No. 3:20-cv-06469-EMC

**CORNING OPTICAL COMMUNICATIONS
LLC'S NOTICE OF RENEWED MOTION
AND MOTION FOR JUDGMENT ON THE
PLEADINGS OF NO WILLFUL
INFRINGEMENT**

Date: March 24th, 2022

Date: March 24
Time: 1:30 PM

Time: 1:30 PM
Courtroom: Courtroom 5 – 17th Floor

1 **NOTICE OF RENEWED MOTION AND RENEWED MOTION FOR JUDGMENT ON THE**
2 **PLEADINGS**

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 PLEASE TAKE NOTICE that on March 24, 2022 at 1:30 PM, or as soon thereafter as the matter may be heard, in Courtroom 5, 17th Floor of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, CA 94102, before the Honorable Edward M. Chen, Defendant Corning Optical Communications LLC ("Corning" or "Defendant") by its attorneys Alston & Bird LLP, will move and hereby does move, pursuant to Federal Rule of Civil Procedure 12(c) for a judgment on the pleadings, dismissing Plaintiff Dali Wireless, Inc's ("Dali" or "Plaintiff") claims for willful infringement, without leave to amend.

Defendant's Renewed Motion for Judgment on the Pleadings is based on this Notice of Motion and Motion, and the accompanying Memorandum of Points and Authorities filed concurrently herewith, as well as the papers, pleadings, and other documents on file in this action, matters properly subject to judicial notice, and such other and further oral or documentary evidence as may be presented at or before the hearing.

DATED: February 18, 2022

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1 **I. INTRODUCTION**

2 On August 19, 2021, the Court granted Defendant Corning Optical Communications LLC's
 3 ("Corning") motion for judgment on the pleadings of no willfulness with leave to amend. On
 4 September 20, 2021, Dali re-pled willfulness in its Second Amended Complaint ("SAC"). Dali's
 5 Second Amended Complaint still falls short. It relies on irrelevant facts, unsupported conjecture, and
 6 the precise type of inferential leaps that this Court previously cautioned against. Dali's willfulness
 7 allegations fail and should be dismissed without leave to amend.

8 **II. SUMMARY OF THE ALLEGED FACTS AND DALI'S WILLFULNESS PLEADING**

9 Dali's First Amended Complaint ("FAC") alleged that from 2010 to 2014, Dali and Corning
 10 engaged in discussions in the hopes of forming a strategic partnership and later potential acquisition.
 11 (Dkt. 7, FAC ¶¶ 34-36). Dali's FAC also alleged that during these discussions, Corning examined
 12 Dali's patent portfolio and technology. (FAC at ¶ 34). For example, Dali alleged that from May
 13 through July of 2012, Corning's intellectual property counsel conducted due diligence on Dali and
 14 that in July 2014, Corning conducted acquisition diligence that included studying Dali's patents.
 15 (FAC ¶¶ 36-37). Dali alleges that Corning's infringement has been willful because Corning examined
 16 Dali's portfolio and technology but did nothing to avoid infringement. (FAC at ¶ 34).

17 On July 15, 2021, Corning filed a motion for judgment on the pleadings of no willfulness
 18 pursuant to Federal Rule of Civil Procedure 12(c) (Corning's "Original Motion"). (Dkt. No. 84). In
 19 its Original Motion, Corning argued that Dali failed to plead adequate pre-suit knowledge of the
 20 patents-in-suit and that Dali failed to plead egregious conduct by Corning. *Id.* On August 19, 2021,
 21 the Court held a hearing on Corning's motion. (Dkt. No. 96). The Court dismissed Dali's willfulness
 22 pleading with leave to amend, and cautioned Dali that "[w]hen you allege willful [infringement], it
 23 seems to me that it is a heavy allegation." (8/19/21 Hrg. Tr. at 7:1-21). The Court also warned Dali
 24 that, in amending its willfulness pleading, "[t]here is going to have to be a fair amount of specificity
 25 consistent with Rule 11 to get around the problematic issues that have been raised by the defense."
 26 (*Id.* at 17:20-21).

27 On September 20, 2021, Dali filed its SAC in which it attempted to re-plead willfulness. A
 28 marked-up version of Dali's SAC is attached as Exhibit 1, with the newly added language

1 highlighted.¹ (See Ex. 1 to Barton Decl.). Dali's new averments can be summarized as follows:

- 2 • **Paragraph 34:** an assertion that Dali lacks an adequate remedy at law to prevent
3 future infringement. This averment relates to whether Dali will be entitled to an
4 injunction (it will not) and is irrelevant to an allegation of willfulness.
- 5 • **Paragraphs 35-39:** an allegation that Corning "had notice of the patents-in-suit prior
6 to the filing of the an [sic] infringement allegation containing the patents-in-suit"
7 based on *actual notice*. Specifically, Dali alleges that Corning had notice of the '358
8 patent in late 2016, had notice of the '261 patent on April 8, 2020, and had notice of
9 the '454 patent on April 15, 2020. The Original Complaint in this case was filed in
10 2019.
- 11 • **Paragraphs 40-70:** a series of unconnected and legally irrelevant allegations
12 regarding Dali's various failed business ventures (for example, its disastrous attempt
13 to provide the DFW Airport with a product), Dali's failed patent litigations (its lawsuit
14 against CommScope in which Dali was found by the jury to have willfully infringed
15 five CommScope patents—a judgment recently affirmed by the Federal Circuit), and
16 reiteration of the same irrelevant theory regarding Corning allegedly "monitoring"
17 Dali's patent portfolio that this Court previously described as "quite an inferential
18 leap." (8/19/21 Hrt. Tr. at 4:10-12).

19 III. LEGAL STANDARDS

20 A. Judgment on the Pleadings

21 The Federal Rules of Civil Procedure state that "[a]fter the pleadings are closed...a party may
22 move for judgment on the pleadings." FED. R. CIV. P. 12(c). A Rule 12(c) motion follows the same
23 standard as a motion to dismiss under Rule 12(b). *Chavez v. United States*, 683 F.3d 1102, 1108 (9th
24 Cir. 2012); *see also Dworkin v. Hustler Mag., Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989) ("The
25 principal difference between motions filed pursuant to Rule 12(b) and Rule 12(c) is the time of

26 ¹ A more traditional "redlined" version is not attached because (a) redlined comparisons of two PDF
27 documents are largely unusable because of pagination differences and (b) only what is new in the
28 SAC is relevant as it is the sufficiency of the contents of the SAC—new and old—that are relevant
 to the instant motion.

1 filing.”). Under both rules, “a court must determine whether the facts alleged in the complaint, taken
 2 as true, entitle the plaintiff to a legal remedy.” *Brooks v. Dunlop Mfg. Inc.*, 2011 U.S. Dist. LEXIS
 3 1419422, at *10 (N.D. Cal. Dec. 9, 2011). A plaintiff must allege facts that are enough to raise his
 4 right to relief “above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)
 5 (citation omitted).

6 “In testing the sufficiency of a pleading, the well-plead allegations of the non-moving party
 7 are accepted as true, while any allegations of the moving party which have been denied are assumed
 8 to be false.” *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989).
 9 The Court may generally consider information “contained in materials of which the court may take
 10 judicial notice” and documents attached to the complaint. *Heliotrope Gen., Inc. v. Ford Motor Co.*,
 11 189 F.3d 971, 981 n.18 (9th Cir. 1999) (citation omitted); *see United States v. Ritchie*, 342 F.3d 903,
 12 908 (9th Cir. 2003). “Judgment on the pleadings may be granted when the moving party clearly
 13 establishes on the face of the pleadings that no material issue of fact remains to be resolved and that
 14 the moving party is entitled to judgment as a matter of law.” *Hal Roach Studios*, 896 F.2d at 1550.

15 **B. Pleading Willfulness**

16 Since *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1935 (2016), courts in this
 17 District require willful infringement claims to show **both** “knowledge of the . . . [p]atents” and
 18 “egregious conduct” in order to survive a motion to dismiss. *See, e.g., Fortinet, Inc. v. Forescout*
 19 *Technologies, Inc.*, 2020 U.S. Dist. LEXIS 204580, *42-45 (N.D. Cal. Nov. 2, 2020); *Google LLC v.*
 20 *Principes Interface Techs.*, 2020 U.S. Dist. LEXIS 52753, *5-10 (N.D. Cal. Mar. 26, 2020); *Software*
 21 *Research, Inc. v. Dynatrace LLC*, 316 F. Supp. 3d 1112 (N.D. Cal. 2018). The Federal Circuit recently
 22 reinforced this principle, stating unequivocally that “[k]nowledge of the asserted patent and evidence
 23 of infringement is necessary, but **not sufficient**, for a finding of willfulness. Rather, **willfulness**
 24 **requires deliberate or intentional infringement.**” *Bayer HealthCare LLC v. Baxalta Inc.*, 989 F.3d
 25 964, 988 (Fed. Cir. 2021)². Stated differently, “a claim for enhanced damages for willful infringement
 26 is not adequately stated when all that is alleged is knowledge of the patent and direct infringement.”

27
 28

 ² All emphasis added unless otherwise noted.

1 *MasterObjects, Inc. v. Amazon.com, Inc.*, 2021 U.S. Dist. LEXIS 194462, *4, (N.D. Cal. Oct. 7, 2021)
 2 (citing *Bayer*, 989 F.3d 964 at 987-88; *SRI Int'l, Inc. v. Cisco Sys., Inc.*, 930 F.3d 1295, 1308-10 (Fed.
 3 Cir. 2019); and *Arctic Cat Inc. v. Bombardier Recreational Prods. Inc.*, 876 F.3d 1350, 1371 (Fed.
 4 Cir. 2017)).

5 A claim of willfulness must include allegations pled through specific facts. *Finjan, Inc. v.*
 6 *Cisco Sys.*, 2018 U.S. Dist. LEXIS 239284, *13-14 (N.D. Cal. Feb. 6, 2018). As noted by Judge
 7 Freeman, “[a] court may not award ‘enhanced damages simply because the evidence shows that the
 8 infringer knew about the patent *and nothing more.*’ *See Halo*, 136 S. Ct. at 1936 (Breyer, J.,
 9 concurring) (emphasis in original). . . a complaint must contain some allegations which make it
 10 plausible that the accused infringer’s behavior was egregious and that allegations of knowledge of
 11 the patents-in-suit alone are insufficient.” *Finjan*, 2018 U.S. Dist. LEXIS 239284 at *15-16.

12 **IV. DALI PLEADING IS INADEQUATE**

13 **A. Dali Fails to Allege Pre-Suit Knowledge of Two of the Patents-In-Suit**

14 Dali’s SAC acknowledges that Corning did not learn of the ’261 and ’454 patents until months
 15 after Dali filed its Complaint on December 30, 2019. *Compare* SAC at ¶¶ 38-39 with Dkt. No. 1. The
 16 fact that Dali does not allege pre-suit knowledge of the ’261 and ’454 patents is fatal to its willfulness
 17 allegations for these two patents. Dali attempts to sidestep this fatal flaw through the use of clever
 18 verbiage: its SAC alleges that “Corning had notice of the patents-in-suit prior to the filing of the an
 19 [sic] **infringement allegation** containing the patents-in-suit in two ways.” SAC at ¶ 36. The issue is
 20 this: the case law makes clear that “pre-suit” knowledge of the patents is what is relevant, but Dali
 21 cannot allege **pre-suit** knowledge as evidenced by its averments in paragraphs 38 and 39. The
 22 Complaint in this case was filed in 2019, and Corning did not have knowledge of the ’261 and ’454
 23 patents until 2020. So what Dali does instead is to allege that notice occurred “prior to the filing of
 24 the an [sic] **infringement allegation** containing the patents-in-suit.” SAC at ¶ 36. This “creative” but
 25 ultimately disingenuous argument regarding **pre-suit** knowledge for the ’261 and ’454 patents should
 26 be rejected.³

27
 28 ³ Even assuming that Dali is correct that pre-infringement allegation notice is all that is required, it
 would **at most** constitute notice of the actual patents (not knowledge of infringement) for 22 days for

1 **B. Dali Fails to Allege Egregious Conduct**

2 The Federal Circuit made it abundantly clear that simple knowledge of the patent is “*not sufficient*...for a finding of willfulness.” *Bayer HealthCare LLC v. Baxalta Inc.*, 989 F.3d 964, 988 (Fed. Cir. 2021). Instead, a party alleging willful infringement must present evidence of “deliberate or intentional infringement.” *Id.* In this district, this standard has been described as requiring a complaint to plead facts alleging “knowledge of infringement.” *See, e.g., MasterObjects, Inc. v. Amazon.com, Inc.*, 2021 U.S. Dist. LEXIS 194462, *11 (N.D. Cal. Oct. 7, 2021); *see also Fluidigm Corp. v. IONpath, Inc.*, 2020 U.S. Dist. LEXIS 12154, at *9 (N.D. Cal. Jan. 24, 2020). “Knowledge of infringement does not arise from knowledge of the asserted patent as a matter of course; it must be the subject of discrete, albeit related, allegations.” *Id.* Dali’s SAC falls woefully short of pleading this element sufficiently.

12 Paragraphs 71 through 74 of the SAC contain the entirety of Dali’s allegations that “Corning’s Conduct is Egregious.” *See SAC at ¶ 75* (“As demonstrated by the examples in paragraphs 71-74, Corning’s conduct in [sic] deliberate and therefore egregious.”). Dali’s pleadings are irrelevant and insufficient:

16 • **Paragraph 71:** Dali’s conclusion that Corning’s “conduct is egregious because it is

17 [] deliberate” is nothing more than a tautological rephrasing of the legal standard, and

18 not a factual pleading in any sense. Moreover, Dali’s apparent assertion that Corning’s

19 conduct is egregious because “it harmed the market for Dali’s products and Dali’s

20 reputation as an [sic] technology leader in the industry” is irrelevant. This allegation—

21 unfounded as it is—is only potentially relevant to whether Dali is entitled to an

22 injunction, not whether Corning’s alleged infringement has been willful. Those are

23 different issues. The remainder of Paragraph 71 is a quote of the appropriate legal

24 standard, and not a factual pleading.

25 the ’261 patent and 15 days for the ’454 patent. Corning submits that this would still fail to

26 constitute meaningful pre-infringement allegation notice that could give rise to a willfulness

27 allegation. *See, e.g., Sapphire Crossing LLC v. Robinhood Mkts.*, 2021 U.S. Dist. LEXIS 8256, at

28 *18-19 (D. Del. Jan. 15, 2021) (granting motion to dismiss willfulness allegations where plaintiff provided notice of the patent 15 hours before filing Complaint and describing it “as the most *de minimis* claim of willful infringement in this Court’s history”).

- **Paragraph 72:** The allegations in Paragraph 72 have nothing to do with willfulness, the asserted patents, or the accused products. In fact, the allegations in Paragraph 72 have nothing to do with this case. Instead, Paragraph 72 contains Dali’s lamentations regarding a “yet-to-be released” Corning product that is not accused of infringement in this case. It is entirely unclear what this paragraph has to do with this case at all, much less what possible connection the allegations in this paragraph have to do with alleged willful infringement of the patents-in-suit. This paragraph also contains assertions regarding alleged irreparable harm—an allegation that, again, has nothing to do with willfulness.
- **Paragraph 73:** This paragraph is an allegation that Corning continues to sell the accused SpiderCloud products. This allegation has nothing to do with whether Corning possessed *pre-suit* knowledge of infringement. It is thus irrelevant. But even if it related to pre-suit knowledge, alleging knowledge and continued infringement is insufficient. *See WiNet Labs LLC v. Apple Inc.*, 2020 U.S. Dist. LEXIS 12138, at *13-14 (N.D. Cal. Jan. 24, 2020); *Fluidigm*, 2020 U.S. Dist. LEXIS 12154, at *9; *XpertUniverse, Inc. v. Cisco Sys., Inc.*, 2017 U.S. Dist. LEXIS 168269, at *19 (N.D. Cal. Oct. 11, 2017).
- **Paragraph 74:** This paragraph contains an allegation that a different Corning product that is not accused of infringement in this case infringes different Dali patents. Again, this has nothing to do with knowledge of infringement. Frankly, it has nothing to do with this case at all.

Dali's irrelevant and, in some instances, bewildering allegations fail to satisfy the requisite pleading standard, either individually or collectively. Dali cannot allege any *facts* supporting a conclusion of egregious behavior or "knowledge of infringement," and dismissal is thus appropriate.

C. Dali Is Out of Chances to Get It Right

This case is not at its infancy; fact discovery is winding to a close. Dali was not unaware of the specific pleading requirements for willfulness; it pled the legal standard in its SAC. Dali cannot plead ignorance as to the Court’s expectations; the Court made its views and expectations abundantly

1 clear at the hearing on the first motion for judgment on the pleadings.⁴ Dali simply lacks facts with
 2 which to plead willfulness. Dismissal without leave to replead is the only appropriate remedy at this
 3 juncture.

4 Corning's need to renew this motion is particularly unpalatable given a recent ruling against
 5 Dali in a case alleging the same theory against Corning in the Western District of Texas. In that case,
 6 Dali sought leave to amend its Complaint after the close of fact discovery to plead willfulness.
 7 Corning opposed. Judge Albright denied Dali's motion, reasoning as follows:

8 The [Proposed Amended Complaint (PAC)] does not adequately allege
 9 Corning's knowledge of infringement. To be sure, the PAC alleges that
 10 Corning learned of the '508 patent in 2018, satisfying the first Parity
 11 element. *See ECF No. 42-7 ¶ 25.* But Dali adduces little else in support
 12 of willfulness, alleging only that the Parties collaborated from 2010-
 13 2014 to develop DAS technology, that Corning became familiar with
 14 Dali's patent portfolio, and Corning envisioned continuing DAS
 15 development with a partner, potentially including Dali. *ECF No. 42-7 ¶¶ 21-24.2* *Dali requests that, because Corning was interested in*
Dali's DAS technology from 2010-2014 and learned of the '508 patent
years later, the Court should infer that Corning knew or should have
known it was infringing the '508 patent. *See ECF No. 46 at 2-3. It will*
not do so. The proposed inference is unreasonable, particularly absent
 16 allegations regarding Corning's conduct from 2014 to 2018 as it relates
 17 to Dali or its technology. Dali argues that "Corning spent years
 18 monitoring Dali's technology," *id.* at 3, yet the PAC cites no evidence
 19 showing Corning did so after 2014.

20 Accordingly, the PAC fails to sufficiently plead willful infringement
 21 because it does not satisfy the third Parity factor. *Dali has not made a*
plausible willful infringement claim entitling Dali to relief,
undercutting any suggestion that his new claim is "important." This
is grounds enough to deny Dali's request for leave.

22 (Ex. 2 to Barton Decl. at p. 5-6 (footnotes omitted)). In other words, this renewed motion is now the
 23 **third** time that Corning has been forced to oppose Dali's attempts to inject willfulness into cases
 24 against Corning, with the first two times both resulting in a Court ruling that Dali's pleadings were
 25 insufficient. Dali yearns to spin a sordid tale of Corning's misdeeds for the jury, but it lacks the ever-
 26 crucial **facts** necessary to do so. Dali's most recent attempt to plead willfulness is just as insufficient

27
 28 ⁴ "There is going to have to be a fair amount of specificity consistent with Rule 11 to get around the
 problematic issues that have been raised by the defense." (8/19/21 Hrg. Tr. at 17:20-21).

1 as its prior attempts, and it should not now be given yet another chance to tilt at the willfulness
2 windmill. Dismissal without leave is appropriate.

3 **V. CONCLUSION**

4 For the foregoing reasons, Corning respectfully requests that the Court enter judgment on the
5 pleadings finding that Dali's SAC fails to state a claim for willful infringement, without leave to
6 amend.

7 **ALSTON & BIRD LLP**

8
9 Dated: February 18, 2022

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